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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 1145

ALLEN M. WAINER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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STATUTES.

Statutes:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No.

ALLEN M. WAINER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Allen M. Wainer, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on January 16, 1956, and is not reported but appears in the printed Record of proceedings before the Court of Appeals for the Seventh Circuit, filed herewith

and certified by the Clerk of said Court, at page 95 of the Transcript of Record. The opinion of the United States Court of Appeals for the Seventh Circuit affirming said judgment was filed January 3, 1957, and is reported at 240 F. 2d 595, and is set forth in the Appendix hereto and in the certified copy of the Record filed herewith.

JURISDICTION.

On February 28, 1957, it was ordered that the petition for rehearing filed by the defendant, be denied. (The orders of the Court of Appeals appear in the Appendix to this petition). This petition is filed within 90 days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under Section 28 U.S.C., Section 1254(1), 62 Stat. 928.

STATUTES INVOLVED.

Pertinent sections of statutes involved herein and in force at the times involved, are as follows:

Section 2800(d), Title 26, U.S.C.A. (1948 Volume)

> "(d) Persons liable. Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom."

Section 3761, Title 26, U.S.C.A. (1940 Volume)

> "§ 3761. Compromises
>
> (a) Authorization. The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case

arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

"(b) Record. Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise."

QUESTIONS PRESENTED.

1. Did Section 3761 of Title 26, U.S.C., (Internal Revenue Code, 1939), the compromise of tax cases by the Secretary of the Treasury through the Commissioner of Internal Revenue permit the compromise of the liability of one of two jointly liable taxpayers, for a nominal sum with reservation of the balance of the liability against the remaining taxpayer, thus enabling the Commissioner to inequitably shift the principal burden of a joint tax assessment to one taxpayer alone? And would not such construction of Section 3761, Title 26, U.S.C., render the statute unconstitutional as delegating to the Commissioner the power of release and assessment of taxes without adequate standards having been established for his conduct?

2. Where the offer in compromise of a joint and several tax liability by one taxpayer contains no indica-

tion of limitation to the liability of the offeror and the formal written acceptance of the offer contains no such limitation, can a trial Court vary and extend the substance and language of such documents on the basis of extraneous circumstantial evidence admitted over objection, and not established by a preponderance of proof as being connected with the offer in compromise and release being construed, and hold that the release actually constitutes no more than a covenant not to sue in favor of one of two joint and several assessees of distilled spirits taxes?

3. Where the conduct of the parties to an offer in compromise and the release executed pursuant to its acceptance are not in accordance with a regulation and directive of the Commissioner of Internal Revenue, purportedly in force at the time, are not the Commissioner of Internal Revenue and his agents thereafter estopped from contending that the release executed varies from its tenor and language, and thus reserves to them an inequitable right of enforcement of a major portion of a joint assessment against a remaining taxpayer?

4. Where the Commissioner of Internal Revenue establishes by regulation and directive, methods, standards and specific procedures for the reservation of liability against one of two joint taxpayers, must not that regulation and directive be obeyed and followed in order to bind other parties to said joint liability, where they are given no notice of the proceeding involving the compromise and claimed release of one of two joint and several assessees of distilled spirits tax?

STATEMENT OF THE CASE.

The Judgment of the Court of Appeals below is based on the second appeal to this Court in a civil suit filed by the United States against Allen M. Wainer on December

28, 1948, for taxes alleged to have been assessed as the result of an operation of illicit distilleries in the year 1935. The Complaint alleged that the defendant, Allen M. Wainer, held and possessed a proprietary interest in two stills. Paragraphs 5, 6, 7 and 8 referred to the alleged operation of an illicit distillery near the town of Carson, Portage County, Wisconsin.

The date alleged in these paragraphs is September 6, 1935 (R. 4, 5). The Court on the first trial, found that the Government did not support its Complaint with regard to this distillery and denied judgment for the taxes alleged to have accrued as a result. This finding and judgment occurred in 1953 and the matters referred to in Paragraphs 5, 6, 7 and 8 are in no way in issue in this case. Paragraphs 9, 10 and 11 of the Complaint (R. 5) alleged the operation of an illicit distillery by the defendant on or about September 26, 1935, "at a point near Joliet, Illinois".

The Answer denied any proprietary interest in the distilleries and the time to file the suit had been extended (R. 8).

The trial Court, on the first trial, found that the defendant did have a proprietary interest in an illicit and unregistered still in Will County, Illinois, and awarded judgment for the Government in the sum of $47,357.63. This sum represented $27,988.50, together with interest to the date of that judgment. In the course of the trial it was developed that Harry Braverman, against whom the assessment was originally made with the defendant, Allen Wainer, as a joint and several assessment, had made an offer in compromise, and that this offer in compromise was accepted. The Court in awarding judgment to the Government allowed a *pro tanto* credit of $5000.00

against the assessment. When this evidence was developed, the defendant moved for leave to amend his Answer to conform with the evidence so that the pleadings would show the compromise effected by Braverman and accepted by the Government, and contended that this event accomplished the release of Wainer's joint liability. The trial Court denied leave to file the amendment and held that the release did not affect Wainer's liability.

On an appeal to the Court of Appeals for the Seventh Circuit by the same defendant in Cause No. 10964, that Court reversed the judgment of the District Court and remanded for the purpose of permitting the filing of the defendant's amendment and determination of the nature of the "release" *United States* v. *Wainer*, 211 F. 2d 669, 673.

After the remand by the Court of Appeals, the defendant was permitted to file an amendment to his Answer on September 16, 1955 (R. 13, 14) and in that Answer alleged that the United States, by acceptance of the offer in compromise by Harry Braverman, compromised the tax liability involved in full, and that the release of Braverman under law was the release of both joint obligors under the assessment.

The plaintiff, the United States, replied to this amendment on September 28, 1955, and denied that the tax was a joint liability, and while admitting that Harry Braverman was released, contended that the release of Braverman constituted a release of his liability alone and that said release had no effect upon the liability of Wainer. Numerous exhibits were appended to this reply, most of which were offered and admitted into evidence by the trial Court upon the second trial, over the objection of the defendant.

At the conclusion of the second trial, the trial Court found that the release did not affect Wainer's liability, and entered judgment against the defendant in the sum of $48,604.15 (R. 95).

The Court's findings of fact and conclusions of law on the second trial, which involved only the construction of the release, appear at pages 92-95 of the printed Record. Immediately preceding the findings of fact and judgment now appealed from are the findings of fact and conclusions of law made by the trial Court in the first trial, on December 5, 1952, which were adopted in part by the trial Court (R. 89, 92).

In the second trial, from which this appeal arises, both the trial Court and counsel for the parties sought to confine themselves to the issue which they conceived was submitted by the mandate of the Court of Appeals under the opinion in *United States* v. *Wainer*, 211 F. 2d 669, 773. The Court of Appeals there said:

> "But since the release in question is not part of the record before us, we have no way of knowing what, if any, provision it contained for preserving the liability against Wainer.
>
> "This leaves us no alternative other than to reverse the judgment of the District Court and to remand the cause with instructions to permit the defendant to amend his answer by pleading the release and for such further proceedings as may be appropriate but not inconsistent with the views herein expressed."

The evidence at the second trial consisted of brief testimony by Harry O'Grady (R. 40-46) and Government exhibits 26 to 34, inclusive, on behalf of the Government. Mr. O'Grady testified that he was an assistant to Percy C. Graham, a collection officer concerned with investigations of offers in compromise in February of 1941. (Percy

L. Graham's signature as a deputy collector appears in the acknowledgment of the signature of Harry Braverman on Government exhibit 29 (R. 64) which document was admitted in evidence).

Mr. O'Grady further stated that it was customary to secure stipulations, such as Government exhibit 29, where liability sought to be compromised involve more than one taxpayer (R. 41).

The other evidence offered by the Government were exhibits 26 to 34 which appear at pages 54 to 87 of the Transcript, in reproduced form.

Exhibit 26 (R. 55) consists of the formal offer in compromise made by Harry Braverman in the case at bar. It contains no limitation of the offer in compromise to the liability of Harry Braverman only. Following the words "The following facts and reasons are submitted as grounds for acceptance of this offer", there appears the words "See statement attached", upon this exhibit. However, no statement is attached to this exhibit as it appeared at the trial.

Government exhibit 27 is a statement of financial condition executed by Harry Braverman and dated February 3, 1941 (R. 57-63). Both of these two exhibits bear the signature of Harry Braverman and are acknowledged by Harry K. Jacobs, Notary.

Government exhibit 28 (R. 63, 64) contains what the Government relies upon as a restriction upon the offer in compromise, to the liability of Harry Braverman only. It is not acknowledged by the same Notary Public who executed the acknowledgments on Government exhibits 26 and 27, and is acknowledged by Percy L. Graham, a deputy collector, and thus, apparently was executed at a different time and place than the first two exhibits mentioned.

The significance of the language of Government exhibit 28 is apparent from an examination of Government exhibit 29 (R. 64-69). This exhibit, 29, is a statement of policy addressed to Collectors of Internal Revenue District Supervisors, and other Internal Revenue officials and employees concerned and sets forth the policy and procedures to be followed where an offer is submitted in compromise of a taxpayer's individual liability to a joint assessment (R. 67). It specifically prescribes the forms and words to be used in setting up any reservations against complete compromise of such joint assessments and directs that the language used in Government exhibit 28 should be inserted in Form 656 which, in this case, is Government exhibit 26 (R. 67). This regulation and directive issued by the Commissioner of Internal Revenue specifically commands that the limitation words should be inserted in Form 656 following the expression: "$..... is hereby tendered voluntarily, with the request that it be accepted in compromise of said liability, to wit". In the case at bar, while apparently some stipulation was procured from Braverman, it was not embodied in Form 656 in accordance with the Commissioner's regulation and directive, and only by implication relates thereto.

The Commissioner's regulation (Gov. ex. 29) further prescribes specifically the form, substance and words of the letter of acceptance to be used in cases where it is intended that the offer in compromise be limited to the liability of the person making the offer only (R. 69).

Government exhibit 30 (R. 71-79) purports to be a copy of an abstract and statement outlining the consideration given to the offer in the case at bar.

Government exhibit 31 (R. 79-81) consists of two letters, one from Stewart Berkshire, Deputy Commissioner, and

one from Guy T. Helvering, Commissioner of Internal Revenue, referring to the acceptance of Braverman's offer. Neither of these letters shows any restriction of the liability sought to be compromised.

Government exhibit 32 is a letter from Stewart Berkshire, Deputy Commissioner, to the Collector of Internal Revenue entitled "Schedule of Accepted Offers in Compromise", stating that the offer in compromise of Harry Braverman on Form 656 had been accepted and that the Collector of Internal Revenue was authorized to apply the amount offered in compromise as an internal revenue collection (R. 82, 83).

Government exhibit 33 (R. 83, 84) is the letter addressed to Harry Braverman notifying him of the acceptance of his "offer in compromise". It contains no reference to any limitation of the liability of the parties concerned in the assessment and although written on December 22, 1941, is not in the language of the regulation and directive by the Commissioner dated March 25, 1938, which prescribes the language to be used where a reservation of liability against other taxpayers is to be made (see paragraph 13 of Gov. ex. 29 at R. 69).

Government exhibit 34 (R. 85-87) is a statement of facts signed by Harry Braverman which is undated, and is perhaps, the statement referred to in Government exhibit 26 (Form 656), (R. 55), where Braverman used the words "See statement attached".

The only evidence offered on behalf of the petitioner was the testimony of the defendant to the effect that he had no knowledge of Braverman's offer in compromise or its acceptance and never received any notice thereof until the first trial in this case.

The trial Court below, in substance, held that all of the documents admitted in evidence indicated the inten-

tion of the parties to the compromise to preserve the liability of Wainer, the petitioner, and its findings of fact and conclusions of law were consistent with this holding except for Finding of Fact XVII (R. 94) where the trial Court said:

> "While this Court is bound by the facts and the law, the equities of this cause appeal to the Court's conscience. This result opens the door for one taxpayer to shift inequitably his share of tax to a co-obligor without notice and without the right of judicial review of the ability of all joint obligors to pay their respective shares."

Thereafter the trial Court entered judgment in accordance with the computations submitted by counsel, in the sum of $48,604.15, from which judgment this appeal is taken.

REASONS FOR GRANTING THE WRIT.

I.

This case presents an important question of federal law, which involves joint and several federal tax liability which has not been, but should be settled by this Court. That is, this Court is requested to decide whether authority exists in the Commissioner of Internal Revenue under Section 3761 of Title 26 (Internal Revenue Code of 1939), (which grants authority to the Secretary of the Treasury to compromise any civil or criminal tax case), to shift to one of two jointly liable taxpayers substantially all of the burden of tax by a release on compromise for a nominal amount to the other liable taxpayer. The statute provides no standards for, or guiding limitation on the power to compromise and the Commissioner has varied his procedure by arbitrary adoption of rules or regulations in a way that affects the substantive rights and liability

of the petitioning taxpayer. The question is of paramount importance because the same joint liability applies to married taxpayers who file a joint income tax return, as does the compromise statute.

It is respectfully submitted that this Court has not passed upon such question and it is urged that the opinion below is unsound and has construed the statutory authority too broadly. The power to compromise has been delegated to the Treasury Department by Congress with no appropriate limiting standards or guides for the conduct of the Department in the acceptance of compromises. The Commissioner of Internal Revenue acting under this statute has seen fit to adopt different regulations and rules governing such compromises at different times, so that, in effect, the Commissioner has changed the substantive liability of taxpayers at his whim, and without Congressional authority or guidance.

It is respectfully urged that the Court of Appeals below has decided this important federal question in a way which is in conflict with applicable decisions of this Court. *Morrill v. Jones*, 106 U.S. 466, 467; *United States v. Eaton*, 144 U.S. 677, 687; *Schechter v. United States*, 295 U.S. 495, 529, 537, 538.

The Court of Appeals below has decided the matter involved in a way which is inequitable and unjust and requires the exercise of this Court's jurisdiction to prevent an injustice.

In this respect this Court's attention is directed to the findings of fact by the trial Judge in this cause at page 94 of the printed Record, where Judge Perry said:

> "While this Court is bound by the facts and the law, the equities of this cause appeal to the Court's conscience. This result opens the door for one tax-

> payer to shift inequitably his share of tax to a co-obligor without notice and without the right of judicial review of the ability of all joint obligors to pay their respective shares."

It is further urged, in support of this Petition for Certiorari, that the Court of Appeals below has, in effect, rendered two inconsistent opinions in this cause. In the opinion of the Court of Appeals for the Seventh Circuit rendered upon the first appeal by the defendant, the Court of Appeals reversed the first judgment of the District Court and said, in *United States* v. *Wainer*, 211 F. 2d 669, 673:

> "From our investigation of the common law, with which the Illinois decisions seem to be in substantial agreement, we are convinced that in this case if the release of Braverman was without any savings clause to show that the intention of the parties was to keep alive the liability of Wainer, the release of Braverman must be considered as also releasing Wainer."

However, in the opinion here presented for review by this Court, the Court of Appeals permitted and affirmed the variance of the release mentioned in its first decision by circumstantial evidence, which it held governed and changed the plain terms of the release involved.

The release executed and drawn by the Internal Revenue authorities appears in the Record at page 84. It contains no savings clause and, on the contrary, indicates that the case is closed and that no further action on Braverman's part was necessary. Volume 76 Corpus Juris Secundum at page 671 states the following regarding the construction of releases:

> "Where general words are used in a release they will be construed most strongly against the releaser;

> and the same has been held as to a release specifying the matters released. It has also been held, however, that an ambiguous release is to be construed most strongly against the one who prepared it."

In its attempt to vary and extend the terms of the general release prepared by the Internal Revenue authorities and issued to Braverman, the Government has introduced a series of extraneous documents. Government exhibit 28 (R. 63, 64) was admitted over objection by the defendant (R. 30) and is the principal evidence offered by the Government to substantiate its contention that only Braverman was released by the document of release which was ultimately executed, exhibit 33, (R. 83, 84). Exhibit 28 (R. 63, 64) contains language prescribed by the regulation and directive concerning compromise of joint assessments promulgated and issued by the Commissioner of Internal Revenue, exhibit 29 (R. 64-70).

However, it will be noted that although the Government contends that exhibit 28 was executed in conjunction with the offer in compromise on Treasury Department Form 656 (Ex. 26, R. 55), it was acknowledged by a different person than the Notary who acknowledged Braverman's signature on the offer in compromise, thereby indicating that whether executed in conjunction with the offer or not, it was done separately, and apparently at a different time and place. In any event, exhibit 28 does not, other than by construction, or inference from the date it bears appear to have been connected with or appended to the offer in compromise in any manner. The evidence does not show that it was intended to restrict or affect exhibit 26. While the effect of its execution upon the same day as the offer in compromise tends to support an inference that it *may* relate to exhibit 26, there is nothing in the Record to show that it may

not have been related to some other offer in connection with some other liability of Braverman's.

In any event, the persons concerned with and obligated under the Commissioner's regulation and directive (Gov. ex. 29) did not follow the regulation by inserting the words contained in exhibit 28 on Form 656 at the prescribed place, and, in fact, did not even append it to the offer in compromise. The wording of this purported stipulation in exhibit 28 does not indicate any relationship to Wainer or to the offer in compromise and release here involved, and there was a complete failure to comply with the Commissioner's direction as to the procedure to be followed by his subordinates in securing a reservation of liability against any remaining joint obligor.

It is respectfully submitted that Braverman's offer, and the purported stipulation contained in exhibit 28 and the release were all executed and accomplished out of the presence of and without the knowledge of this defendant, Wainer (R. 47, 48). Under these circumstances it is respectfully contended that the Government's proof in order to substantiate any extension of the written terms of the release issued by the Commissioner and his subordinates should be clear, unequivocal and convincing. It is not enough that this extraneous circumstantial item of proof should be consistent with the Government's contention. The United States Court of Appeals for the Eighth Circuit in *Lukehart* v. *Gleason*, 207 F. 2d 529 said at page 532:

> "As stated in *Claussen* v. *Estate of Johnson*, 224 Iowa 990, 278 N.W. 297, a theory may not be said to be established by circumstantial evidence *even in a civil action* unless the facts relied upon are of such a nature and so related that it is the only conclusion that can fairly and reasonably be drawn from them.

and it is not sufficient that the facts and circumstances merely be consistent with the conclusion sought to be established, they should be inconsistent with any reasonable theory to the contrary." (Emphasis supplied)

The testimony of the witness O'Grady indicated that in 1941 the Internal Revenue Service was operating on joint assessments in accordance with the Commissioner's regulation dated March 25, 1938, and set out in the Record at pages 65 to 69.

It is fairly obvious, and in the view of the defendant quite clear, that the Commissioner's subordinates did not treat this offer in compromise in accordance with the specific prescriptive commands of the Commissioner's directory regulation. This regulation (R. 69) specifically provides that the letter to the proponent of an offer advising of the action taken thereon, (and thus constituting the release) should be in certain language, referring to the stipulated reservation of liability against third parties, and definitely stating; that the acceptance of the offer does not release other persons from liability. Of course, the letter to Braverman, (Ex. 33) constituting his release contains no such language, and merely refers to his offer in compromise as executed on Form 656-C (ex. 26, R. 55). It is respectfully submitted that the Government has not sustained its burden of showing clearly and unequivocally, any reservation of liability against Wainer, and that this conclusion should be adopted even without consideration of the inequitable shifting of tax liability accomplished in this case.

II.

Section 3761 of Title 26, U.S.C.A., Authorizing the Compromise of Tax Cases by the Commissioner of Internal Revenue, Without the Statutory Creation of Any Appropriate Standards for the Administration of Such Section, Is Unconstitutional as a Delegation of the Taxing Power, If Construed to Authorize the Inequitable Shifting of Tax Liabilities by the Commissioner, Without Limitations on Such Power.

It is respectfully submitted that Section 3761, Title 26, in force during the period involved here, and not materially amended by the Revenue Act of 1954, (see Section 7122 of the Internal Revenue Code of 1954) contains an extraordinary delegation of authority upon the Commissioner of Internal Revenue. It authorizes the compromise of any civil or criminal case arising under the Internal Revenue laws prior to reference to the Department of Justice for prosecution or defense, and thus undoubtedly is the only endowment of specific power to compromise a crime. No standards or other guides for the administration of this tremendously powerful authority have been prescribed by Congress. The Commissioner is not restricted to compromise for any specific reason, and for all the statute states, any reason is sufficient for his compromise and release of a taxpayer if it appeals to the Commissioner. It will undoubtedly be contended that by the adoption of reasonable regulations, the section is, nevertheless, constitutional. The only regulation or regulatory directive introduced or relied upon by the Government in this case is Government exhibit 29 prescribing the method for accomplishing the release of one of several joint and several assessees of distilled spirits taxes.

The defendant urges that consideration of Section 2800 (d) and its accompanying paragraphs, all disclose that

although several persons having a proprietary interest in an illicit still may be made liable for the tax upon the alcohol produced, nevertheless, only one tax is imposed. Obviously, this grants to the Government the right to pursue to judgment and collection all and any of the parties made liable by the statute.

The Internal Revenue Bureau, however, has arrogated to itself, under its construction of Section 3761 of Title 26, the power to eliminate this statutory liability of one of several joint and several assessees, for a nominal sum, and to transfer or impose upon the remaining party to the assessment the great burden of the tax imposed. In the case at bar, Braverman was released from this assessment and another on payment of $5,000.00. The judgment assessed against his joint and several obligor amounts to $48,604.15 (R. 95).

The trial Judge in this case, impressed by the inequities in this cause, said in his findings of fact (R. 94):

> "While this Court is bound by the facts and the law, the equities of this cause appeal to the Court's conscience. This result opens the door for one taxpayer to shift inequitably his share of tax to a co-obligor without notice and without the right of judicial review of the ability of all joint obligors to pay their respective shares."

The power to tax has been described as the power to destroy. Of course, the power to excuse from a tax liability created and imposed by an act of Congress is a tremendous power. The construction placed on Section 3761 by the Bureau of Internal Revenue would appear to delegate to the Commissioner the power to excuse one of two jointly and severally liable taxpayers and to impose or shift the entire burden to the remaining tax-

payer, all without any standard for the exercise of such purported authority.

The Supreme Court of the United States has several times rejected the theory that the Secretary of Treasury, or his subordinate, the Commissioner, can by regulation amend the law adopted by Congress so as to impose tax or alter liability to tax or create tax offenses. *Morrill* v. *Jones*, 106 U.S. 466, 467, 27 Law Ed. 267, 268; *United States* v. *Eaton*, 144 U.S. 677, 687, 36 Law Ed. 591, 594.

It is respectfully submitted that if Congress had intended to confer upon the Commissioner of Internal Revenue the broad power asserted by his action in the instant case, such intention could have and should have been stated expressly. The extension of the power granted by Section 3671 of Title 26 has resulted in an inequitable shifting of tax liability between taxpayers, in arbitrary fashion. This was recognized and stated by the trial Court. It is the contention of the defendant that such a construction of Section 3761 would render it unconstitutional and a violation of due process of law.

Of course, the power to lay taxes is reposed in the Congress. The famous decision of the Supreme Court in *Schechter* v. *United States*, 295 U.S. 495, 79 L. ed. 1570, which held the National Recovery Act to be unconstitutional, at page 529 and thereafter discussed the general principles which govern the determination of the question of delegation of legislative power. It was said:

> "The Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. 1, § 1. And the Congress is authorized 'to make all laws which shall be necessary and proper for carrying into execution' its general power. Art. 1, § 8, ¶ 18. The

> Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

After substantial discussion of the principles and decisions thus involved, the Supreme Court in the *Schechter* case, at pages 537, 538 of the opinion, said:

> "But Congress cannot delegate legislative power to the President to exercise an *unfettered discretion* to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.
>
> "According we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion." (Emphasis supplied).

The Revenue Acts have all provided for the adoption by the Secretary of the Treasury of needful regulations for execution of the various sections of the Act. But, of course, these regulations cannot create or amend laws. It is the position of the defendant in this case that Section 3761, if construed to permit the elimination of one of two joint and severally liable taxpayers from an assessment by the Commissioner, then it is unconstitutional because it is a delegation of an "unfettered discretion", which cannot be assisted by regulation. The only semblance of regulation called to the attention of the trial Court by the defendant is exhibit 29 (R. 65). Paragraph 2 of this document (R. 65, 66) demonstrates the "unfettered discretion" which the Commissioner apparently believed was vested in him under Section 3761.

Of course, the Courts will avoid such construction of a statute as will render it unconstitutional, if such construction is not compelled by the nature of the statute and its terms and language. It is respectfully submitted

that the Government's construction of Section 3761, Title 26, U.S.C.A., would render it unconstitutional.

III.

Where the Commissioner of Internal Revenue Adopts and Issues a Regulation and Directive Prescribing Specific Language and Acts to Be Performed to Accomplish the Reservation of Liability Against One of Two Jointly Liable Taxpayers, the Regulation and Directive Must Be Complied With, or Such Reservation of Liability Does Not Occur.

It has heretofore been illustrated that the activity of the Commissioner and his delegates in receiving, accepting and releasing liability under the offer in compromise in the case at bar substantially failed to follow the provisions of the regulation, rule or directive contained in the document admitted as Government exhibit 29 (R. 65). The offer in compromise on Form 656-C, a printed Treasury form, did not have inserted at any place the words required by paragraph 7 of exhibit 29, and the release issued to Braverman (Gov. ex. 33, R. 83, 84) was not in the language of paragraph 13 of Government exhibit 29 (R. 69) and contained no reservation of liability against any persons other than the proponent of the offer.

Thus, even if the Government's construction of the statute is adopted, there was a failure on the part of the Government to comply with its own regulation in the matter and the shifting of the bulk of the tax liability involved here was void and action therefor should be barred.

The release was executed and delivered by the Government and, if ambiguous or general, should be construed

most strongly against the Government, 76 C.J.S. ¶ 38 at page 671.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH,
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Attorney for Petitioner.

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11777 SEPTEMBER TERM AND SESSION, 1956

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALLEN M. WAINER,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

January 3, 1957

Before DUFFY, *Chief Judge*, MAJOR and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* This cause was previously before us on appeal by defendant from an order denying his motion to amend his answer. 211 F. 2d 669. In the original proceeding the United States sought, pursuant to 26 U.S.C.A. § 2800(d), to recover taxes plus penalties and interest assessed on distilled spirits and alcohol seized at an illicit unbonded distillery near Joliet, Illinois in 1935, in which the defendant and others allegedly had a proprietary interest. The trial court awarded a judgment of $47,357.63 against defendant, less a *pro tanto* credit of $5000.

During the course of the original trial, it developed that Harry Braverman, with whom defendant was jointly

and severally assessed, had submitted an offer in compromise which had been accepted by the Commissioner of Internal Revenue without notice to defendant, in accordance with his authority under 26 U.S.C.A. § 3761(a), which provides *inter alia* that: "The Commissioner, with the approval of the Secretary, * * * may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense * * *." At the close of the case, defendant moved to amend his answer to conform to the evidence and to allege that the acceptance of the offer in compromise effectively released him from liability. The District Court noted that "defendant's motion to amend his answer to conform to the evidence * * * presents for judicial determination the question as to whether a release, through compromise, of one assessee from the joint and several assessments * * * releases the other assessee." It concluded that the acceptance of the offer in compromise extinguished merely the individual liability of Braverman and did not constitute a release of defendant. On appeal the taxpayer urged that the lower court was in error in its determination that the effect of a release of one of two or more joint and several obligors failed, as a matter of law, to extinguish the liability of the others. There is no doubt but that this issue was squarely presented to this court on the prior appeal in this manner even though documentary evidence constituting the release itself, was not before us at that time. As we stated in our opinion at page 671: "The principal questions presented here are whether the taxpayer had such a connection with the distillery as to be liable for the taxes assessed, *and whether the release of Braverman by the acceptance of his offer in compromise effected also the taxpayer's release.*" (Emphasis supplied). Therefore, as no special circumstances exist herein for a redetermination of the aforementioned issue, our conclusion on the former appeal constitutes the law of this case. *Commercial Nat. Bank in Shreveport* v. *Connolly*, 176 F. 2d 1004, 1006 (CA-5); *Consumers Petroleum Co.* v. *Consumers Co.*, 176 F. 2d 441, 442 (CA-7); *United States* v.

Huff, 175 F. 2d 678, 679 (CA-5); *May Department Stores Co.* v. *Reynolds*, 140 F. 2d 799, 800 (CA-8).

On the first appeal we concluded that, in the absence of a saving clause, the release of one of two or more joint and several obligors would release them all. However, as previously stated, at that time, the release in question was not a part of the record and we had no basis for determining its nature and scope. Consequently, the judgment was reversed with instructions to grant defendant leave to file his amended answer, for the purpose of determining whether or not the release did in fact contain a saving clause. From the evidence introduced on retrial after remand, the trial court found from the terms of the compromise agreement that the government had effectively reserved its rights against this defendant.

On this, the second appeal, the defendant in asserting that there was no restrictive language in the compromise agreement, presents assignments of error upon which we shall comment as we discuss the nature of the evidence presented.

On February 3, 1941, Harry Braverman submitted an offer in compromise of $5000 on Form 656-C together with a Statement of Financial Condition and Other Information. Both documents were certified by Harry K. Jacobs on that date. The offer was designated by serial number 443. At the time of this submission, there were no other offers of Braverman outstanding. On the same day, Mr. Braverman executed a statement containing the following pertinent language: "My Liability to pay the balance of said tax, penalties and interest, remaining after deducting from the assessment the amount hereby tendered, collection of which balance shall not be enforced against me by suit or any other proceeding; *it being understood that this undertaking shall not release any other person from liability under said assessment.*" (Emphasis supplied.) This document was acknowledged by Percy L. Graham, was not attached to the offer in compromise and does not refer specifically to the offer in question, but was executed

and acknowledged on the same date as the offer in compromise.

It is defendant's position that as this statement was not acknowledged by the same party, and as, inferentially, it was not signed at the same time and place, these facts in themselves precluded the District Court from concluding that the restrictive instrument was executed in conjunction with and intended to be a component part of the offer in compromise. Such a contention, we think, is simply without foundation, inasmuch as on its face the document was executed and authenticated on the same day as the offer in compromise, and could have referred only to the offer in question as there were no other offers of Braverman outstanding at that time. In the absence of other evidence, the fact that a different party acknowledged the signature is of no material significance. It is clear from the evidence in the record that the restrictive clause was intended to constitute an integral part of the offer in compromise.

An interoffice memorandum issued by the Commissioner to the various Collectors of Internal Revenue, dated March 25, 1938 (Com-Mimeograph Coll. No. 4749, A.T. No. 158) indicated that the prior policy had been to treat the acceptance of an offer in compromise from one of two or more taxpayers jointly and severally liable to a single assessment, as determinative of the entire assessment and a release of all taxpayers involved. By this memorandum, however, the Commissioner initiated the following change of policy: "if an offer, submitted by one of two or more taxpayers named in a single assessment, is accompanied by a stipulation that it is to cover the liability of the proponent alone, such offer may be accepted in compromise of such proponent's individual liability without releasing the remaining taxpayers from liability to the assessment, less the amount of the offer." Also included was a declaration of the procedure to be followed "Where an Offer is Submitted in Compromise of a Taxpayer's Individual Liability to a Joint Assessment", whereby it was declared that a stipulation should be obtained from the

proponent evidencing that the offer was limited to his individual liability and containing the exact language to be used, which was identical with that used by Mr. Braverman in the separate document executed by him previously alluded to. Similarly, the language to be used in the letter of acceptance to a taxpayer was spelled out. The only deviations from the instructions in the case before us were that the restrictive statement was not inserted in Form 656-C as required, and that the language used in the letter of acceptance to taxpayer Braverman did not conform. Nevertheless, the procedure established by the Commissioner's statement of policy was substantially complied with. Even if there were a material deviation, that in itself, would not be determinative of the matter at issue, as the policy outlined by the Commissioner in the mimeograph was merely directory and not mandatory in character.

If defendant's contention were correct, it would hamper not only the government in effecting a compromise, but also the taxpayer under certain circumstances. To approve defendant's suggestion would be to sacrifice the principle of compromise to mere form of procedure and render settlements with the government delusive and uncertain. As was aptly expressed in *Willingham* v. *United States*, 208 F. 137, 139 (CA-5): "If the defendant in good faith made the payment of the tax and penalty for the purpose of compromising the impending criminal action, he is entitled to the full effect and benefit of it regardless of whether or not he followed any technical rules of procedure laid down by the Internal Revenue Department."

In evidence were other documents constituting, in main, interdepartmental correspondence relating to the compromise of Broverman's liability which defendant insists do not reflect an intention on the part of the government to rely on the saving provision in Braverman's offer in compromise. However, in the abstract and statement which recorded the action taken by the Commissioner it is quite clear that the statement executed by Braverman

was considered as part of the offer in compromise. The particular serial number 443 was referred to, which we have previously determined included the restrictive clause. However, there is also the following statement: "this compromise is for proponent's individual liability, such proposition being in the form of the stipulation prescribed by Com. Mim., Coll. No. 4749, A.T. No. 158, dated Mar. 25, 1938.", which clearly indicates an intent to rely on the so-called stipulation.

One of the essential ingredients relied on by the defendant to indicate that the government release did not contain a saving clause is a letter of December 22, 1941 to Braverman from the government formally accepting his offer in compromise. This letter does not *in haec verba* state that it is only the individual liability of Mr. Braverman that is being released. However, in the caption of this piece of correspondence serial number 443 is referred to as is the amount of the offer.

We need not further discuss the nature of the evidence introduced below, for when viewed in its entirety, the conclusion is inescapable that the saving clause constituted a component part of the compromise agreement whereby the government effectively preserved its rights against the taxpayer in question.

Finally, it is urged that the effect of 26 U.S.C.A. § 3761, the source of the Commissioner's power of compromise, is to lodge in the Commissioner an unfettered discretion, in effect, to shift partially the tax burden from one party to another without notice to the other taxpayer upon acceptance of an offer in compromise. However, taxpayer evidently fails to recognize the significance of a joint and several assessment whereby the government could single out any one of the assessed taxpayers and proceed against him for the entire amount of the assessment without any basis for complaint on his part.

UNITED STATES COURT OF APPEALS

Thursday January 3, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge

This cause came on to be heard on the transcript of the record from United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS

Thursday, February 28, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge

It is ordered by the court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.